ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

May 18, 2011

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701

OR2011-06987

Dear Ms. Alexander:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 417910.

The Texas Department of Transportation (the "department") received a request for all documents and communications related to the department's acquisition of parcel 716 in Harris County, Texas. You claim the requested information is excepted from disclosure pursuant to sections 552.105 and 552.111 of the Government Code, and privileged under rule 192.3 of the Texas Rules of Civil Procedure. We have considered the submitted arguments and reviewed the submitted representative sample of information.[1]

We note the submitted information contains completed appraisal reports subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). You seek to withhold the information at issue under sections 552.105 and 552.111 of the Government Code. However, sections 552.105 and 552.111 are

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[1]We assume that the "representative sample" of information submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

discretionary in nature and do not constitute "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 564 (1990) (statutory predecessor to section 552.105 subject to waiver), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Thus, the department may not withhold the information subject to section 552.022 in Exhibits B or C under section 552.105 or section 552.111 of the Government Code. As you raise no further exceptions to disclosure of the appraisal reports in Exhibit B, the department must release this information pursuant to section 552.022 of the Government Code. You also contend, however, the appraisal reports in Exhibit C are protected by the consulting expert privilege found in rule 192.3(e) of the Texas Rules of Civil Procedure. The Texas Supreme court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will address your arguments under rule 192.3(e) for the information in Exhibit C subject to section 552.022. We will also address your arguments for the information not subject to section 552.022 of the Government Code.

First, we address your argument under section 552.105 of the Government Code for the information not subject to section 552.022. Section 552.105 excepts from disclosure information relating to "appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property." Gov't Code § 552.105(2). Section 552.105 is designed to protect a governmental body's planning and negotiating position with respect to particular transactions. Open Records Decision Nos. 564 at 2 (1990), 357 (1982), 310 (1982). Information that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. But the protection offered by section 552.105 is not limited solely to transactions not yet finalized. This office has concluded that information about specific parcels of land obtained in advance of other parcels to be acquired for the same project could be withheld where release of the information would harm the governmental body's negotiating position with respect to the remaining parcels. *See* ORD 564 at 2. A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

You state the department has made a good-faith determination the requested information in Exhibits B and C relates to the appraisal or purchase price of real property the department intends to purchase. You explain the department still needs to purchase property in the area of parcel 716 and assert release of the requested information would harm the department's negotiating position with respect to the acquisition of the remaining property. Based on your representations and our review, we conclude the department may withhold the information

in Exhibits B and C not subject to section 552.022 under section 552.105 of the Government Code.

The consulting expert privilege is found in rule 192.3 of the Texas Rules of Civil Procedure. A party to litigation is not required to disclose the identity, mental impressions, and opinions of consulting experts whose mental impressions or opinions have not been reviewed by a testifying expert. *See* Tex. R. Civ. P. 192.3(e). A "consulting expert" is defined as "an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert." Tex. R. Civ. P. 192.7.

You inform us that, when acquiring land, the department obtains expert advice from licensed appraisers in preparation for possible eminent domain litigation. You assert these appraisers are thus experts consulted in anticipation of litigation. You also state that at this time, the department does not anticipate calling the expert who prepared the submitted report as a trial witness. Based on your representations, we conclude that the department may withhold the appraisal report in Exhibit C under Texas Rule of Civil Procedure 192.3(e).

In summary, the department must release the information in Exhibit B subject to section 552.022 of the Government Code. The department may withhold the remaining information in Exhibit B and the information we have marked in Exhibit C under section 552.105 of the Government Code. The department may withhold the remaining information in Exhibit C under Texas Rule of Civil Procedure 192.3(e).

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 417910

Enc.   Submitted documents

c: Requestor
        (w/o enclosures)